VIRGINIA LAW REGISTER.

EDITED BY W. M. LILE.

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WE are glad to welcome the initial number of the *Columbia Law Review*, published by the students of the Columbia University Law School. The publication promises well, and the REGISTER could wish the new journal no greater success than that which in its salutatory it expresses the hope to attain, namely, to rise to the standard of the *Harvard Law Review*—a publication which, in our opinion, is without a serious rival among American law journals.

WITH the beginning of its third volume, our valued contemporary, the *Virginia Supreme Court Reporter*, passes into the management of the Everett Waddey Co., the well-known Richmond publishing house, and appears in a handsome new cover. We find the *Reporter* practically indispensable, and commend it to Virginia practitioners who desire to keep "on the firing line." Our only objection to it is that it reaches us folded instead of flat, to the great inconvenience of the reader.

WE are indebted to the courtesy of the Lawyers' Co-Operative Publishing Company, of Rochester, N. Y., for a copy of Mr. Justice Story's address on Chief Justice Marshall, delivered in 1852 at the request of the Suffolk (Mass.) bar. The brochure is a beautiful specimen of the printer's art, on handsome paper, and contains a fine lithograph portrait of the Chief Justice. The oration is published in honor of "John Marshall Day," and the publishers offer it for gratuitous distribution among members of the bar who will remit the small sum of five cents to cover the postage.

"JOHN MARSHALL DAY," February 4, 1901, will be celebrated in handsome style in the city of Richmond, under the joint auspices of

the Virginia State Bar Association and the Bar Association of the city. We acknowledge an invitation to be present.

An address on the life and character of the great Chief Justice will be delivered by Mr. Justice Gray, of the Supreme Court of the United States, and the celebration will close with an elaborate banquet. The occasion promises to be a notable one, worthy of the memory of the great Virginian in whose honor it is held.

WE have had occasion recently to consider when a writ to commence suit is regarded as "issued;" that is, whether it is issued as soon as the clerk has filled the blanks and attested it, and the writ is ready to be delivered to the plaintiff or officer for service, or whether it only receives vitality when delivered to the officer for service, or is at least put in the course of delivery for that purpose. See Va. Code, secs. 3223, 3220, 3222. So far as known, the question has not been judicially passed upon in Virginia. The authorities in other States are divided. Our impression is that the view generally prevailing in Virginia is that the writ is issued as soon as it is completed by the clerk, provided it is intended, in good faith, for immediate service.

The question is one of obviously practical importance, and we invite communications on the subject—either mere statements as to the view prevailing in a particular circuit, or brief discussions of the legal aspect of the question. In 5 Va. Law Reg. 270, will be found some discussion of the point as to when a suit is commenced, but not of the precise question suggested.

TO THOSE of our readers who are interested in the question of the right of a married woman to claim the benefit of the homestead exemption in Virginia, discussed in *Richardson* v. *Woodward*, the opinion in which case, with editorial note thereto, appeared in our December number (p. 533), we commend a careful perusal of the well-reasoned paper of Mr. Purdie, published elsewhere as a leading article.

We are not now prepared either to accept or to reject Mr. Purdie's conclusions, but we cheerfully concede that the decision of the interesting question must finally rest on the Constitution, where Mr. Purdie places it, rather than on the statute mainly relied on in the editorial.

In the former discussion it was conceded that if the husband were an invalid, or had deserted his family, so that the wife were in fact the bread-winner of the family and literally its head, she might be

entitled to the exemption. But it was doubted whether the wife could exercise this right where the husband, as in the case under discussion, was regularly at work, contributing to the support of the family, and had already, while the wife's claim to the exemption was pending, filed his own petition in bankruptcy, claiming and having been allowed the benefit of the "poor law" exemption as the head of the family.

Further discussion is invited.

It seems fitting to make some mention of the elaborate paper on "Essentials of a Valid Marriage in Virginia," appearing in several of our late numbers, and concluded in the January number. The article was written by Mr. Warren D. Harris, of Georgia, an undergraduate student of the University of Virginia Law School, during the session of 1899–1900. It was awarded the Edward Thompson Company prize—a set of the new Encyclopedia of Law—for the best thesis by a member of the Law School.

The paper sheds much light on the interpretation of that difficult proviso, found in many of the marriage statutes, declaring that want of authority in the celebrant shall not affect the validity of the marriage, "if the marriage be in other respects lawful and be consummated with a full belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage." Va. Code, sec. 2222. The origin, and the legislative and judicial history of the clause, are traced with great care, and the result is a valuable addition to the literature of this branch of the law of marriage as it exists in America.

Another excellent feature of the article, deserving unstinted praise, is the history of the Virginia statutes regulating marriage—from early colonial days to the Code of 1887. Our Virginia readers have doubtless found this local history not less interesting than the conclusion reached as the present state of the local law. This conclusion, namely, that a common-law marriage—that is, formed without license and without celebrant or ceremonial of any kind—is valid in Virginia, seems thoroughly established.

Mr. Harris is now a member of the firm of McPheeters & Harris, of the St. Louis, Missouri, bar.

In our August number we made some comments on the recent case of *Roehm* v. *Horst* (20 Sup. Ct. 780), in which the Supreme Court of

the United States accepted and enforced the doctrine of the anticipatory breach of contracts. In the course of the comment it was said that a corollary of this doctrine was, that where one party to a contract notifies the other that he will not perform his part of it, the other has no right to proceed with the execution of the agreement, and thus enhance the damages, but that his remedy is to sue for the damages accrued by reason of the breach at that stage of the transaction.

We print elsewhere a communication from Mr. Paul A. Moses, of Chicago, taking exception to this statement of the law, and maintaining that the party so notified of repudiation by the other before time of performance, may disregard the notification, and proceed with his preparations up to the day of performance, even though the damages will thus be materially enhanced.

It is probably true that authority may be found for the view thus expressed, and *Roebling Sons Co.* v. *Lock-Stitch Co.*, 130 Ill. 660, referred to, seems to be a case in point. But the principle is unsound both in reason and by the great weight of authority.

Let us suppose that a cable company, proposing to lay a cable from San Francisco to Manila, contracts with a manufacturer to supply nine thousand miles of peculiarly constructed cable, deliverable one year thereafter, and at a price involving many millions of dollars. Before the date fixed for delivery, and before the manufacturer has begun preparations, he is notified by the company of its total repudiation of the contract, and—as extreme cases afford the best test of the soundness of any principle—notified further that a cable of the prescribed specifications has been ascertained to be useless for the transmission of telegraphic messages.

According to our correspondent's view, the manufacturer may disregard the notice of repudiation, and proceed with the manufacture of the impracticable cable, and, upon refusal of the company to accept delivery at the stipulated date, may recover the millions of dollars of damages suffered by reason of having on his hands the nine thousand miles of worthless and unsaleable cable. The statement of such a case seems its own best refutation.

It is probably true that the party willing to perform the contract may disregard the notice and to this extent keep the contract alive until the time of performance arrives, provided he do nothing to enhance the damages. If damages are increased by reason of the plaintiff's mere inaction, after his election to keep the contract alive, then it may be that the defendant would properly be held liable for the

ensuing damages. Such seems to have been the case of *Kadish* v. *Young*, 108 Ill. 170, where the buyer of grain, under an executory contract, notified the seller that he would not accept delivery at a future date fixed for delivery. The market continuing to fall, the seller might have sold on receipt of the notice, and recovered the smaller loss suffered. But it was held that he was under no obligation to take affirmative action, and in a suit brought after the stipulated date for delivery, he was allowed to recover the greater loss, represented by the difference between the contract price and the market price on the day agreed upon for delivery.

Since the date of Mr. Moses' communication he has contributed to the *National Corporation Reporter* an admirable paper on the anticipatory breach of contracts, an extract from which we publish under the head of "Miscellany." This extract is itself a complete answer, as it seems to us, to the position taken in his letter. The leading authorities are collected in this extract, and we need not here repeat them.

Freeman's monographic note on this subject, in 33 Am. St. Rep. 791–797, collects and digests the authorities. The conclusion there announced (p. 796) is: "Although a notice from one of the parties to a contract that he does not intend to perform it, may be regarded by the other party as a breach for which suit may be brought, he is not obliged to avail himself of this privilege, but may, if he prefers it, continue to treat the contract as still in force for certain purposes, always, of course, with due regard to the necessary limitation *that he cannot do anything to increase the damages which will ultimately fall on the defaulting party.*"

The distinction attempted to be made between notice given before time of performance and notice given after—a distinction apparently made in *Roebling Sons Co.* v. *Lock-Stitch Co.* (*supra*), and maintained in Mr. Moses' letter—is shown in his subsequent contribution referred to, to be wholly unsound in principle and not in accordance with the authorities generally.

We reproduced in our last issue a brief editorial from the *Harvard Law Review*, on "*The disseisin requisite to support ejectment,*" in which was discussed the right of a land-owner to maintain ejectment against a street railway company, whose tracks had been laid on a highway over plaintiff's land, without legal authority. The point made seems sound, namely, that while there must be an ouster of the

plaintiff before he can maintain the action, yet a permanent trespass, of the character described, is a substantial exclusion of the owner from a part of his fee, and therefore sufficient basis for the action of ejectment.

We publish elsewhere, from the same learned source, an editorial on "*The acquisition of title under the statute of limitations,*" discussing the kindred question as to the effect of the statute of limitations in barring ejectment and vesting title in the defendant, where a cause of action has existed for a period beyond the statutory limit, and yet there has been no adverse possession. The case illustrating this situation (*Bond* v. *O' Gara* [Mass.], 58 N. E. 275), was that of a licensee in possession of real estate under a license from the owner, who, without notice to the licensee aliened the property to a stranger. The occupant continued in possession for more than twenty years without knowledge of the alienation. The court held that although the license was ended by the conveyance, and a cause of action immediately accrued to the grantee, yet the fact that a cause of action had existed for more than twenty years did not bar a recovery, since there was an absence of adverse possession. The comment upon this is, that if the language of the statute of limitations alone be looked to, the fact that a cause of action for the recovery of the property had existed for a period beyond the statutory limit, would bar a recovery by the grantee; since the statute says nothing about adverse possession, and merely provides that no entry shall be made or action brought except within a prescribed number of years (fifteen in Virginia) "after the right to make such entry or bring such action shall have first accrued."

But as pointed out by the learned writer, the courts have not interpreted the statute literally, and, apparently influenced by the doctrine of prescription, have made adverse possession, not referred to in the statute, the test of its application.

Our purpose in referring to the subject, is to call attention to the peculiar language of the Virginia statute on the subject of ejectment. (Va. Code, sec. 2726, amended by Acts 1895–6, 514).

Before amendment, this section read as follows: "The person actually occupying the premises shall be named defendant in the declaration. If they be not occupied, the action must be against some person exercising acts of ownership thereon or claiming title thereto, or some interest therein, at the commencement of the suit. . . ." This would itself indicate that no possession (and hence, of course, no adverse possession) was necessary to sustain ejectment. But the

amendment seems drawn so as to leave no doubt on that point: "The person actually occupying the premises [shall], and any person claiming title thereto or claiming any interest therein adversely to the plaintiff, may also, at the discretion of the plaintiff, be named defendants in the declaration. If there be *no person actually occupying the premises adversely to the plaintiff*, then the action must be against some person exercising ownership thereon, or claiming title thereto, or some interest therein, at the commencement of the suit." . . .

The original section was construed in *Stearns* v. *Harman*, 80 Va. 48, as authorizing an action of ejectment against one claiming title but not in adverse possession—and relief was refused the plaintiff, who sought to quiet title in equity, against one not in possession, on the express ground that there was adequate remedy at law.

Where one statute thus in express terms gives a cause of action against one not in adverse possession, and another statute in equally plain terms declares that such action shall not be brought except within fifteen years (Va. Code, sec. 2915) "next after the time when the right to bring the same shall have first accrued," it is an interesting question how far the courts may refuse to enforce the statute according to its plain terms, and may require adverse possession as a condition precedent to the bar of the statute.

In the absence of statute, adverse possession is a condition precedent to the running of the statute, since it is generally essential to create a cause of action. In order to sue in detinue, the defendant must have deprived the plaintiff of personal property—a mere claim, not amounting to deprivation of possession, would not sustain the action. But as soon as the defendant has given the plaintiff a cause of action, the statute of limitations begins to run and not before. The same principle applies in all personal actions. In such actions, the moment when the cause of action arises is coincident with that when the statute of limitations begins to run—since the statute, in terms, fixes the accrual of the cause of action as the starting point for the period of limitation. Until there is a cause of action—by the breach of the contract or the consummation of the tort—the statute has no vitality. "Next after the right to bring the same shall have first accrued" is the language in which the limitation is generally expressed (see Va. Code, sec. 2920).

Since the language of the section applicable to actions to recover real property is substantially in the same form, "next after the time at which the right to . . . bring such action shall have

first accrued," and since the action may in Virginia, by the peculiar provision of the statute quoted, accrue without adverse possession, there would seem to be some difficulty in justifying a distinction between personal actions and actions to recover real property—reckoning the period of limitation in the one case from the accrual of the cause of action, and refusing to so reckon it in the other, and substituting another and different date, to-wit, that when adverse possession began.

The question is probably more academical than practical in Virginia, in view of the deeply rooted principle that adverse possession is essential to the acquisition of title by lapse of time, as laid down in so many of the Virginia decisions. Our apology for mention of the subject in this place is the hope that we may thus provoke discussion by some of the many experts in this State on the law of real property